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STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Application of

LIYANAGAMAGE RANGANATH PRABASHWARA DIAS,

Petitioner,

-against-

Index No. E2024003035

UNIVERSITY OF ROCHESTER,

Respondent.

for a Judgment pursuant to Article 78
of the Civil Practice Law and Rules

MEMORANDUM OF LAW IN OPPOSITION TO THE VERIFIED PETITION

BOND, SCHOENECK & KING, PLLC
Laura H. Harshbarger
Liza R. Magley
One Lincoln Center
Syracuse, New York 13202-1355
Telephone: (315) 218-8000
Email: lharshbarger@bsk.com
lmagley@bsk.com

Attorneys for Respondent
University of Rochester

17599931

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PRELIMINARY STATEMENT

On February 14, 2024, Petitioner Liyanagamage Ranganath Prabashwara (a/k/a "Ranga") Dias, Ph.D. ("Petitioner" or "Dr. Dias") commenced this Article 78 special proceeding against Respondent University of Rochester ("Respondent" or the "University") by filing, *inter alia*, a Verified Petition (NYSCEF Doc. No. 1) ("*Pet*."). Petitioner is a faculty member at the University.

The science underlying this case is complicated, but the legal issues are not.

Petitioner published a series of articles in scientific journals claiming to have made major scientific advances in the field of condensed matter physics. Specifically, Petitioner claimed to have conducted research achieving "superconductivity" (*i.e.*, hyper-efficient transmission of electricity) in conditions not previously scientifically demonstrated. Petitioner's scientific claims were met with amazement that morphed to skepticism. Eventually, these articles would be retracted – one-by-one – by the scientific journals that had published them.

Petitioner's research had been funded, in part, by the National Science Foundation ("NSF"). On March 16, 2023, NSF's Office of the Inspector General requested the University undertake an investigation to determine if Petitioner had committed "fabrication, falsification or plagiarism, as defined by NSF's regulations." The University did so and appointed a committee of world-renowned experts to consider the allegations. After months of interviews and painstaking data review, the investigation committee produced 124 pages of written analysis, concluding that Petitioner, in fact, had fabricated and falsified his research.

Petitioner brings this Article 78 special proceeding to ward off – or at least delay – any employment consequence to him arising out of this finding. The University implements a multi-step process before it reaches a decision to terminate a faculty member. Petitioner asks the Court to intervene to stop the University from making this decision. There is no basis for granting Petitioner the relief he seeks.

First, the scope of judicial review in an academic matter is limited. The role for the courts is limited to two questions: procedurally, whether the university's decision was reached in "substantial compliance" with its policies, and substantively, whether the decision was "arbitrary" or "capricious". Upon review of the record, we respectfully submit that the Court will find that the University's investigation was conducted in compliance with its applicable policy and its findings were anything but arbitrary or capricious.

Second, the real aim of Petitioner's entreaty is to call the Court to a place beyond the well-established scope of judicial review. Petitioner asks this Court to become involved in the University's decision-making process in real time. The request for relief is that the Court "enjoin[] [the University] from taking any adverse action against [Petitioner] until a grievance committee establishes an unbiased factual record, and an unbiased committee is convened to evaluate the allegations of research misconduct." This is a confused, inaccurate muddling of the University's policies, but, more than that, it is not a request for the Court to review of a university decision or process; it is a request for the Court to *direct* a university decision and process. This is not the role the courts.

FACTUAL BACKGROUND

For a complete recitation of the facts relevant to this action, the University respectfully refers the Court to the Affirmations of Stephen Dewhurst, Ph.D., executed March 28, 2024 ("*Dewhurst Aff.*") and David Figlio, Ph.D., executed March 25, 2024 ("*Figlio Aff.*"), as well as the University's Verified Answer to the Verified Petition, all of which are filed contemporaneously herewith. The following provides only a brief rendition of the events.

A. The University's Research Misconduct Policy

The University has procedures for responding to concerns that a faculty member may have engaged in misconduct in conducting academic research (the "Research Misconduct Policy").

Dewhurst Aff., Ex. B.[1] The Research Misconduct Policy has four major stages: (1) Allegations; (2) Inquiry; (3) Investigation; and (4) Adjudication and Further Action. *See id.*

To summarize, upon receipt of an allegation of research misconduct, the University may initiate an inquiry, which is a preliminary review. *Dewhurst Aff.*, Ex. B ("Allegations, Inquiry"). If the inquiry determines that the allegations merit a full investigation, the Dean appoints at least three (3) faculty members "who have the appropriate expertise" and are "unaffected by the inquiry". *Dewhurst Aff.*, Ex. B ("Investigation"). The Research Misconduct Policy provides that "generally" the investigation will be completed within 120 days. *Id*. The Policy expressly contemplates that deviations may be made: "[t]he procedures outlined may be adjusted as needed to accommodate special circumstances (e.g. allegations which originate outside of the University)." *Dewhurst Aff.*, Ex. B ("Introduction"). When the investigation is complete, the investigation committee drafts a report stating whether there has been research misconduct. *Dewhurst Aff.*, Ex. B ("Investigation").

In the case of a finding of research misconduct, the adjudication phase begins. *Dewhurst Aff.*, Ex. B ("Adjudication and Further Action"). The report proceeds to the Provost, who makes "the final findings and, if appropriate, determination concerning corrective action". *Id.* If the Provost determines that termination of the faculty member is appropriate, then the case is referred to the University's faculty termination procedures. *Id.* These procedures involve a faculty committee appointed by the University Committee on Tenure and Promotion ("UCTP"). *See Handbook* [NYSCEF Doc. No. 7, p. 51]. The faculty committee's role is not to investigate the allegations anew but rather accepts the findings of the investigation and provides their

[1] A streamlined version of the policy is contained in the faculty handbook. *Dewhurst Aff.* at ¶13; *see also* [NYSCEF Doc. No. 7, pp.48-52]. **All references to documents filed on the docket are to NYSCEF page numbers.**

recommendation as to disciplinary penalty. *See id.* The President reviews the faculty committee's recommendation and makes his or her own determination. [NYSCEF Doc. No. 7, pp. 51-52]; *see also Figlio Aff.*, ¶18. If the President decides on a sanction lesser than termination, the President's decision is final. *Id.* If the President decides termination is appropriate, the University's Board of Trustees considers the matter and renders a final decision. *Id.*

B. The University First Receives Concerns about Petitioner's Research

Petitioner is an Assistant Professor in the Departments of Mechanical Engineering and Physics and Astronomy. As an Assistant Professor, Petitioner does not have tenure. *Figlio Aff.*, ¶16.

On October 14, 2020, the scientific journal *Nature* published an article on which Petitioner was the senior and corresponding author[2] entitled "Room-temperature superconductivity in a carbonaceous sulfur hydride" (the "*Nature* 2020 Article"). *Dewhurst Aff.*, ¶19, Ex. C. On June 30, 2021, the scientific journal *Physical Review Letters* ("*PRL*") published an article on which Petitioner was the senior and co-corresponding author entitled "Colossal density-driven resistance response in the negative charge transfer insulator MnS_2" (the "*PRL* 2021 Article"). *Id.*, ¶20, Ex. D. On July 7, 2022, the scientific journal *Chemical Communications* ("*CC*") published an article on which Petitioner was the senior author entitled "Carbon content drives high temperature superconductivity in a carbonaceous sulfur hydride below 100 GPa" (the "*CC* 2022 Article"). *Id.* ¶22, Ex. E. On March 8, 2023, *Nature* published an article on which Petitioner was the senior

[2] In scientific literature, the order in which authors are listed conveys their research role. The senior author (*i.e.* the principal investigator or scientist who supervised and guided the research) is listed last. The other co-authors are listed in decreasing order relative to their research contributions, such that an individual who did more of the work is listed first (a "first author") and those who contributed less are listed in the middle (a "middle author"). The corresponding author is the author to whom manuscript-related correspondence should be directed, and often overlaps with the senior author.

author entitled "Evidence of near-ambient superconductivity in a N-doped lutetium hydride" (the "*Nature* 2023 Article"). *Id*., ¶24, Ex. F.

All of these articles would later be retracted by the scientific journals that published them. *Dewhurst Aff*., ¶¶ 19-26. However, at the time, the substantial research integrity failures that would lead to their retraction were unknown to the University.

Over Fall 2021 and into the Fall of 2022, the University received a series of allegations from other scientists directed at the validity and integrity of the *Nature* 2020 Article. In response, the University conducted three inquiries (Inquiry 1, 2 and 2A). The University utilized a combination of its own faculty and external reviewers to conduct these three inquiries. All three of the Inquiries (1, 2 and 2A) were closed without a finding that a full investigation was warranted. However, Inquiry 2 resulted in a recommendation that Petitioner should submit an erratum to correct ambiguities in the *Nature* 2020 Article based on the reviewers' conclusion that the research, as written and published, verged on misleading. *Dewhurst Aff.,* ¶¶27-30.

Separately, *Nature* had concerns about the validity of Petitioner's data and began conducting its own review of the 2020 Article. In May 2022, *Nature* retracted the 2020 Article. The scientific community also had been raising concerns about the data and findings in the *PRL* 2021 Article and the *CC* 2022 Article. *Dewhurst Aff.,* ¶¶31-34.

C. The National Science Foundation Directs the University to Investigate

On March 16, 2023, NSF, which funded some of Dr. Dias's research at the University, directed the University to conduct an investigation into allegations of research misconduct (the "Investigation") via an "Investigation Referral Letter". *Figlio Aff.* ¶4, Ex. A. The Investigation Referral Letter targeted the subject matter of the Investigation primarily on the research published in two (2) articles: *Nature* 2020 Article and *PRL* 2021. In response, the University initiated its Investigation procedures in the Research Misconduct Policy. *Dewhurst Aff.,* ¶¶35-37.

Ordinarily, the University appoints three (3) of its faculty members to investigate allegations of research misconduct. The University determined that it did not have three (3) members of the faculty qualified in the subject matter to investigate the allegations who had not already been involved in the three (3) earlier Inquiries. Additionally, this Investigation was at NSF's direction as part of the University's grant funding obligation, and, NSF, an external body, would be relying on the investigation. The University's internally-conducted Inquiries had not quieted the rising volume of concerns from the scientific community that something was amiss with Petitioner's scientific claims, and all of this had now risen to the level of the NSF's Investigation Referral. *Dewhurst Aff.* ¶¶39-41. For all these reasons, the University appointed an external panel of three (3) experts (the "Investigation Committee"). *Dewhurst Aff.* ¶¶43-49.

D. The Research Misconduct Investigation Findings

On December 22, 2023, after meeting more than fifty (50) times, conducting numerous interviews (including interviewing Petitioner on three (3) separate occasions), and examining voluminous data, the Investigation Committee made available to Petitioner its draft investigation report (the "Draft Investigation Report"). *Dewhurst Aff.*, ¶ 82; *See Pet.* Ex. L [NYSCEF Doc. No. 17].

On January 30, 2024, Petitioner sent a response to the Draft Investigation Report (the "Report Response"), dated January 29, 2024, to the University. *Figlio Aff.* Ex. C.

On February 8, 2024, the Investigation Committee completed its final report of its investigation, entitled "Dias Investigation Committee Report, University of Rochester" (the "Final Investigation Report"). *Figlio Aff.* Ex. B.

The Final Investigation Report summarizes the Investigation Committee's findings as follows:

> Under the Policy, the role of the Investigation Committee is to make a recommendation as to whether, based on a formal examination and evaluation of relevant facts, **it is more likely than not that research misconduct has occurred in regard to Respondent's experimental research at issue**.
>
> The Investigation Committee has viewed and heard significant evidence, described below in detail, supporting its conclusion that the preponderance of the evidence supports a finding of research misconduct for each of the 15 allegations pertaining to the Papers and one allegation pertaining to the NSF Proposal. **Specifically, the Investigation Committee finds that Respondent engaged in falsification, fabrication, and/or plagiarism of data, images, and text within each of the Papers and the NSF Proposal. The Investigation Committee's determination, as set forth below in regard to each allegation, is that the evidence indicates that there was a significant departure from accepted research practice; that the misconduct was committed with at least recklessness; and that it is more likely than not that research misconduct occurred**. The Investigation Committee wishes to emphasize, particularly for Respondent's benefit, that the Investigation Committee's charge was not to examine whether the scientific theories underlying the allegations are correct, but rather whether these allegations meet the criteria for research misconduct set forth immediately above.

Figlio Aff., Ex. B (emphasis added).

E. The Next Steps as Concerns Petitioner's Employment as a Faculty Member

On February 14, 2024, Petitioner was notified that the Provost had "accepted the findings and conclusions with respect to research misconduct as set forth in the Investigation Committee's final report – specifically, the Investigation Committee's findings of research misconduct as to Allegations A1-5, B1-2, C, D1-7, and E," and that the University is "considering certain corrective actions," and "will inform NSF and other relevant funding agencies." *See Figlio Aff.,* Ex. E. That same day, the University submitted the Final Investigation Report to NSF. *Dewhurst Aff.*, ¶87.

On February 26, 2024, Provost Figlio referred the case to a faculty committee "for potential removal prior to the end of the period for which [Petitioner is] appointed and termination of [his] employment by the Board of Trustees for academic cause," and that the "grounds for this referral

are the findings by the . . . Investigation Committee in its final report which determined that [Petitioner's] conduct constituted serious research misconduct, including fabrication of data." *Figlio Aff.*, ¶¶14, Ex. F.

The faculty committee's recommendation will be considered by the President, and, depending on the President's judgment, the matter may proceed to the Board of Trustees, as only the Board of Trustees is empowered to decide whether Petitioner's employment should be terminated. *Id.* at ¶14, [NYSCEF Doc. No. 7, pp. 51-52]. However, none of these latter steps have yet occurred.

POINT I
THE MATTER IS NOT RIPE AND ADMINISTRATIVE REMEDIES ARE NOT EXHAUSTED

To the extent Petitioner brings this special proceeding as a challenge to his termination, the issue is not ripe for review and/or Petitioner has not exhausted his administrative remedies.

A non-final decision is not reviewable in an Article 78 proceeding. *See* CPLR §7801(1). *See also Dozier v. New York City*, 130 A.D.2d 128, 134 (2d Dept. 1987). Additionally, even where a decision is otherwise final, a special proceeding may not be commenced until internal avenues of challenge are exhausted. *Id.* When "there are further administrative steps available to secure a change in result, a party must pursue them before going to court." *See* CPLR §7801(1). *See also Geherin v. Sylvester*, 75 A.D.2d 991 (4th Dept. 1980).

The University has not made a final decision to terminate Petitioner. The Provost has recommended Petitioner's termination. This recommendation is pending before a faculty committee, which allows Petitioner a right to be heard, and after which the faculty committee will make its recommendation. The President will review the faculty committee's recommendation. If President determines Petitioner should be terminated, the matter will be presented to the Board of Trustees, which will make the final decision. *Figlio Aff.,* ¶¶15-19.

As no final decision as to his employment status has been made and there exist means for him to challenge the termination recommendation, the Verified Petition should be dismissed.

POINT II
PETITIONER FACES A HIGH BAR:
THE ARTICLE 78 LEGAL STANDARD

To the extent Petitioner brings this special proceeding to challenge the University's finding that he committed research misconduct, the University's findings are final.

"Courts have a 'restricted role' in reviewing determinations of colleges and universities." *See Matter of Powers v. St. John's Univ. Such. of Law*, 25 N.Y.3d 210, 216 (2015) (citations omitted); *see also Maas v. Cornell Univ.*, 94 N.Y.2d 87, 92 (3d Dept. 1999)(universities are "peculiarly capable of making the decisions which are appropriate and necessary to their continued existence"). "In reviewing [faculty termination decisions], a court, which must not substitute its judgment for that of the university, must determine whether the determination was made in violation of the university's rules, or is arbitrary and capricious" *Matter of Fruehwald v. Hofstra Univ.*, 82 A.D.3d 1233, 1234 (2d Dept. 2011). Even in the case of discharge of faculty, judicial review is limited to these grounds. *See Leibowitz v. State Univ. of New York*, 85 A.D.2d 293, 295 (3d Dept. 1982).

It is well-established that a petitioner challenging a university action faces a high bar.

As to the procedural standard for review (*i.e.*, compliance with applicable policy), it is not any or every procedural defect that will support the overturning of a university determination. The university's process need only have been in "substantial" compliance with applicable policy. *Loebl v. N.Y. Univ.*, 255 A.D.2d 257 (1st Dept. 1998). "Substantial compliance" is not perfect compliance with every procedural requirement. *Matter of Fruehwald,* 82 A.D.3d at 1234 (2d Dept. 2011).

As to the substantive standard for review (*i.e.*, arbitrary or capricious), the courts accord significant deference to the university:

> As "the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters" . . . . Deference should be accorded to a college's determination, "and judicial review is circumscribed to whether the [college] failed to substantially comply with its internal rules and whether its decision was arbitrary [and] capricious or made in bad faith."

Hansbrough v. College of Saint Rose, 209 A.D.3d 1168, 1170-1171 (3d Dept. 2022) (collecting cases).

"Rationality is what is reviewed under ... the arbitrary and capricious standard" *Hansbrough,* 209 A.D.3d. at 1171 (collecting cases). A decision is not arbitrary or capricious unless it is made "without sound basis in reason or regard to the facts." *Matter of Fruehwald,* 82 A.D.3d at 1234. The fact that another decisionmaker, and even the court itself, may have made a different decision is insufficient. *See Hansbrough,* 209 A.D.3d at 1172 ("Supreme Court should not have supplanted the judgment of [the university] with its own" (citing *Matter of Kinkle–Ansah v. New York City Dept. of Educ.,* 189 A.D.3d 1048, 1050 (2d Dept. 2020)); *see also Matter of Vengalattore v. Cornell Univ.,* 161 A.D.3d 1350, 1355 (3d Dept. 2018).

POINT III
THE UNIVERSITY SUBSTANTIALLY COMPLIED WITH APPLICABLE POLICY AND WAS NOT ARBITRARY OR CAPRICIOUS

A. The Composition of the Investigation Committee

The Verified Petition alleges that the Final Investigation Report must be set aside because the Research Misconduct Policy requires that the Investigation Committee be comprised of members of the faculty; and the appointed Investigation Committee members (Marius Millot, Ph.D., Peter Celliers, Ph.D., and Marcus Knudson, Ph.D.) were "biased" against Petitioner. *Pet.* ¶¶25-51 ("A Biased Committee").

The simple answer to Petitioner's complaint that non-faculty were appointed to the Investigation Committee is that the Research Misconduct Policy expressly allows for deviations from its usual protocols. The Policy does not restrict the circumstances in which deviations may be made and even expressly contemplates that an investigation initiated outside the University (as occurred in this case via NSF) is such a circumstance. *Dewhurst Aff.*, Ex. B ("The procedures outlined may be adjusted as needed to accommodate special circumstances (e.g. allegations which originate outside of the University.")) The University cannot have failed to comply with a policy that contains a provision allowing it to deviate from its terms.

Further, the University's exercise of its discretion to deviate was neither arbitrary nor capricious. The University had good and sound reasons for its decision that an external panel of experts should conduct the Investigation. The research at issue is highly specialized, and the University determined that it did not have enough faculty with the necessary expertise to conduct the Investigation who had not been involved in the earlier preliminary Inquiries. The University was undertaking the Investigation, not at its own initiative, but at the direction of NSF, and NSF would be relying on its findings. *Dewhurst Aff.*, ¶39-41. In sum, the University's decision that the Investigation Committee should be comprised of non-faculty experts was not arbitrary or capricious.

It is necessary to correct Petitioner's false statement in his Verified Petition concerning when and how his supposed "concerns" about the composition of the Investigation Committee came to light. He alleges that, on September 8, 2023, "*upon learning* of the composition of the Investigation Committee" (emphasis added), he wrote to NSF raising his concerns. *Pet.* ¶ 33. This is not what occurred. Petitioner had participated in interviews with the Investigation Committee *on three (3) separation occasions in June and July of 2023*. *Dewhurst Aff.* ¶¶ 54-56. Yet, Petitioner

did not raise his supposed concerns about the composition of the Investigation Committee until September 2023. *Pet.* ¶ 33. Thus, Petitioner delayed four (4) months before claiming that the Investigation Committee was improperly constituted.[3]

The Investigation Committee met at least fifty (50) times. It interviewed many of the co-authors on the articles under investigation. *Dewhurst Aff.* ¶ 82. It requested volumes of information and data related to the scientific claims made in the articles. *Id.* The Investigation Committee produced a comprehensive draft report, allowed Petitioner to respond with his own comprehensive response, and then it arrived at its Final Investigation Report, which consists of 124 pages of analysis and rationale for its findings, in addition to hundreds of pages of exhibits. *Dewhurst Aff.,* ¶¶ 82-87. The Verified Petition attempts to brush all this away with the claim that the Investigation Committee was "biased" against him. To support this weighty allegation, Petitioner offers only the thinnest reeds.

He alleges that Dr. Millot and Dr. Celliers have a professional relationship such that one may be disinclined to exercise judgment autonomous of the other. *Pet.* ¶¶ 34-35. In addition to being pure speculation, even if true (it is not), this would not reflect "bias" *against Petitioner*.

The Verified Petition alleges that there is a "rivalry" with Petitioner because the Investigation Committee researches in the same field as him. *Pet.* ¶¶ 38-42. With this allegation, Petitioner sets up a damned if you do, damned if you don't scenario: if the committee does not understand his highly specialized research, they are unqualified to judge him and, if they do, they

[3] Curiously, Petitioner objected to the composition of the Investigation Committee the day after his co-authors issued a letter to *Nature* withdrawing their support for the *Nature* 2023 Article and requesting that it be retracted. *Dewhurst Aff.* ¶¶ 71-73. It would appear that, once Petitioner realized that his co-authors no longer had confidence in the published research, the Investigation was very likely not to turn out in his favor, and Petitioner began pulling levers to delay the inevitable, a course of action that continues to this day.

know too much to be fair. In any event, Dr. Millot, Dr. Celliers and Dr. Knudson are not pursuing the discoveries Petitioner is pursuing. *Dewhurst Aff*., ¶ 81.

Petitioner's next set of allegations is a variation on the theme. Petitioner alleges that Dr. Millot, who chaired the Investigation Committee, knows people who know Petitioner. *Pet.* ¶¶ 43-47. The allegations are based on multiples degrees of removed relationship: Dr. Millot has had scientific disagreements with Petitioner's "mentor"; Dr. Millot has an unspecified "personal relationship" with a person with whom Petitioner used to have a business relationship; and Dr. Millot's wife is "close friends" with a person who used to be the "partner" of Petitioner's former business partner. *Pet.* ¶¶ 43-47. In narrow fields of scientific study, as with other specialized fields of work, people are going to be generally aware of each other and have mutual acquaintances.[4] This does not mean that they are unsuited to reach fair determinations after reviewing a body of information. In similar circumstances, courts have found this insufficient to amount to a disqualifying conflict of interest. *See e.g., Doe v. Colgate University*, 2017 WL 4990629 (N.D.N.Y. 2017) at *16 (limited interactions between a party and decision makers did not render them partial or biased).

Most important is the legal standard that applies to this proceeding. The question is whether *the University* was *arbitrary or capricious* with respect to its choices for the Investigation Committee. It clearly was not. Before seating any of the committee members, Vice President for Research Dr. Dewhurst, on behalf of the University, vetted each candidate. Dr. Dewhurst asked each of them whether they were aware of anything that would pose a conflict of interest. *Dewhurst*

[4] Petitioner also alleges that Drs. Millot, Celliers and Knudson have worked with scientists who know other scientists, including scientists affiliated with the University. *Pet*., ¶¶36, 39. This is to be expected in highly specialized scientific fields and, in any event, does not begin to demonstrate bias or conflict of interest as concerns Petitioner. *See also Dewhurst* Aff., Ex. P, pp. 5-6.

Aff. ¶¶ 47-49, Exs. G-I, Ex. M. Then, when Petitioner raised these issues (belatedly), Dr. Dewhurst went back a second time and re-analyzed the question of conflict of interest based on the issues Petitioner had raised. *Dewhurst Aff.* ¶ 73-80, Exs. G-I, M, P. He determined that none rose to the level of presenting an actual conflict of interest. *Id.* The Verified Petition does not present any actual, supportable basis for the accusation of conflict of interest or bias, but, more to the point in light of the standard of review, there can be no rational argument that the University acted with "arbitrariness or capriciousness" with respect to the composition of the Investigation Committee.

B. The Student Witnesses

Petitioner alleges that the Investigation was "biased" against him because Dean Dr. Wendi Heinzelman made a decision to remove students from his laboratory during the course of the Investigation. The Verified Petition alleges, "Heinzelman's actions undoubtable [sic] prejudiced these student witnesses – giving the impression of wrongdoing by [Petitioner] before the investigation was completed." *Pet.* ¶ 53. The allegation itself makes clear that this is pure speculation. Despite having access to all of the materials gathered in the Investigation, Petitioner offers not one shred of proof (or even a specific allegation) that any student's information provided to the Investigation Committee was tainted. Even a casual reading of the Investigation Report demonstrates that the Investigation focused on objective facts (*i.e.*, was there or was there not scientific proof of published scientific claims), not subjective impressions about Petitioner. In any event, the sequence of events do not allow for Petitioner's speculation: the students had already been interviewed by the Investigation Committee by the time the Dean decided that they should be moved to other labs. *Dewhurst Aff.* ¶ 65.

The Verified Petition also alleges that the University and the University's legal counsel "collaborated" with student witnesses to submit a retraction letter to *Nature*. *Pet.* ¶¶ 59-64. Several of the University's students and one employee research assistant, who were named co-authors on

the *Nature* 2023 Article (which had been published days prior to NSF's Letter of Referral) had grown concerned about the mounting public criticism of the Article, as well as about the veracity of the data they relied on in allowing their names to be listed as co-authors. *Dewhurst Aff*. ¶¶ 67-72. These individuals approached the University for assistance in disassociating their names and professional reputations. *Id.* Notably, both University-affiliated individuals *and* other scientists agreed the *Nature* 2023 Article should be retracted.[5] *Id*. The University providing requested assistance to its students in no way impugns the findings of the external Investigation Committee.

The Verified Petition notes that Petitioner filed an internal grievance alleging that the removal of students from his laboratory violated his academic freedom and that no decision has been rendered by the faculty committee assigned to hear his grievance. *Pet*. ¶¶ 52-58. Petitioner argues that his grievance over students in his lab "cannot be assessed separately from the Investigation" and therefore the Investigation should not have proceeded until his grievance has been heard. [NYSCEF Doc. No. 2, p. 12]. This is nonsense. The Investigation concerns NSF's directions to investigate allegations that Petitioner's published scientific claims were the result of fabrication, falsification and/or plagiarism. Whether the Dean had the institutional authority to move students from Petitioner's lab has nothing to do with whether Petitioner published falsified, fabricated or plagiarized research. Petitioner's argument to the contrary is nothing more than a desperate effort at deflection. It does nothing to demonstrate that the University was arbitrary or capricious or failed to follow its policies and procedures as concerns the research misconduct allegations against him.

[5] When Petitioner heard of his co-authors' concerns and intent to seek retraction, he had his lawyers issue his co-authors a cease and desist letter threatening them with legal action if they expressed their doubts to *Nature*. *Dewhurst Aff*., ¶ 71, Ex. J.

C. Petitioner's Remaining Allegations

Petitioner's remaining allegations are a collection of complaints about the process. None of them support that the University failed to substantially comply with the Research Misconduct Policy, and none of them support that the Investigation or its findings were arbitrary or capricious. They are merely preferences for a different policy or process or arguments that the Investigation Committee reached the wrong result. Petitioner's argument for a different process or for a different outcome does not meet the high bar necessary to disturb a university's process and decision.

Petitioner's allegations are based in part on the premise that the University did not provide him with "due process". In this, Petitioner is misguided. As a faculty member at a private university, Petitioner is not due the full panoply of due process rights but rather only those provided for in the University's policies. *See Moghimzadeh v. College of Saint Rose*, 236 A.D.2d 681, 681 (3d Dept. 1997).

Petitioner complains that he was not permitted during his interviews with the Committee to have an attorney present with him.[6] *Pet*. ¶ 75. However, the Research Misconduct Policy does not permit a faculty member to be accompanied by his personal attorney but rather "a member of the faculty or staff of the University"[7]. *Dewhurst Aff*., Ex. B at 2 ("Investigation" (3)). *See Stapor v Wagner Coll*., 44 Misc.3d 1209(A), at * 4 (Sup. Ct., Richmond County 2014)(no right to counsel where college policy did not provide for the right). Therefore, Petitioner is complaining that he disagrees with the policy, but not that the policy was violated.

[6] Petitioner seemingly alleges that the need for him to have counsel is because English is not his first language. *Pet.,* ¶ 88. The role of an attorney is not to be an interpreter. In any event, Petitioner, who publishes in English, never indicated that he was unable to explain his research in English or otherwise required the assistance of an interpreter. *Dewhurst Aff*., ¶ 57.

[7] Petitioner did not take advantage of the opportunity to have a faculty or staff member present during his interviews. *Dewhurst Aff*., ¶ 57.

Petitioner also complains that he was not provided a fair opportunity to respond to the Investigation Committee's draft investigation report. *Pet*., ¶¶92-93. Petitioner was provided with a month to respond and then an additional week extension. *Dewhurst Aff.,* ¶¶82-84. Petitioner provided hundreds of pages in response. *Figlio Aff.,* Ex. C. Petitioner points to no basis for a conclusion that the length of time provided for his response was a failure to "substantially comply" with the University's Research Misconduct Policy.

Petitioner complains that the Investigation took longer than the 120 days set forth in the Research Misconduct Policy. *Pet*. ¶ 90. It is well established that the mere fact that time periods laid out in a university policy were not adhered to does not alone equate to a failure to substantially comply with the policy; instead, there must be a showing of prejudice. *See Gurvits v Mount Sinai Hosp. Ct*., 294 AD2d 102, 102 (1st Dept. 2003). Petitioner has been continuously employed by the University throughout the Investigation. The Verified Petition fails to even allege any prejudice he experienced based on the length of the investigation.

The Verified Petition argues that persons who provided information unhelpful to Petitioner should not have been credited by the Investigation Committee. A research assistant should not have been believed because his salary went from being paid by grant funding controlled by Petitioner (apparently a non-biasing dependency) to the University's funding (apparently a biasing dependency). *Pet.* ¶¶65-68. A former graduate student should not have been credited because he was a troublemaker in the lab who left on bad terms. *Pet.* ¶115-119. Another graduate student should not have been credited because he isn't a very good scientist anyway. *Pet.* ¶¶120-122. An individual not affiliated with the University should not have been believed because he and Petitioner were no longer business partners. *Pet.* ¶114. The fact remains that these individuals were the co-authors of the articles. Petitioner's argument that the Investigation Committee should not

have relied on their information is merely Petitioner's disagreement with the Investigation Committee's conclusions; it is not evidence of arbitrariness or capriciousness.

Petitioner complains that the Investigation Committee did not speak to two current students. *Pet.*¶¶110-112. The two students Petitioner is referencing were the most junior in his lab. *Dewhurst Aff.* ¶64. One was not a co-author on any article under investigation, and one was only a middle author on one article. *Id.* The Committee determined individuals to interview based on their role in the specific experiments under scrutiny. *Id.* The Committee's decision not to interview these students is not "arbitrary or capricious".

Petitioner complains that the Investigation Committee relied on a graduate student co-author to provide the Investigation Committee with certain research data, who -- predictably -- was "biased". *Pet.* ¶123-137. Petitioner had been requested to provide key raw data on many occasions. He never did. *Dewhurst Aff.* ¶82. And this was the primary problem: Petitioner published relatively fantastic scientific claims, but, when asked to produce the specific raw data[8] to support those findings, he did not. That the Investigation Committee attempted to obtain data in the course of the investigation through others (*see id*. at ¶61) does not support that the Investigation Committee acted arbitrarily or capriciously.

At the end of the day, Petitioner's arguments amount only to disagreements with the Investigation Committee's substantive evaluation of the case. This is simply not enough to meet his burden. Courts consistently refuse invitations to reweigh the evidence or reevaluate credibility. *See Hansbrough,* 209 A.D.3d at 1172 ("Supreme Court should not have supplanted the judgment of [the university] with its own" (citing *Matter of Kinkle–Ansah v. New York City Dept. of Educ.,*

[8] Petitioner produced charts and plot points that he had created, but anyone can do that, and it does not prove that his research experiments had produced those results. Only raw data can do that.

189 A.D.3d 1048, 1050 (2d Dept. 2020)); *see also Matter of Vengalattore v. Cornell Univ.,* 161 A.D.3d 1350, 1355 (3d Dept. 2018). This is true in the simplest, most straightforward of cases. This is especially true when the topic of a university decision is the acceptable standards for scientific research.

Where, as here, the Investigation Committee gathered information and evidence over many months – including having met with Petitioner on three (3) separate occasions, asked Petitioner on multiple occasions to provide the data supporting his published scientific articles, interviewed co-authors on the articles, met as an Investigation Committee no fewer than fifty (50) times, issued a comprehensive draft report to which Petitioner provided a comprehensive response, and then issued a 124-page Final Investigation Report with hundreds of additional pages of exhibits, explaining its findings and the reasons for those findings -- there is zero basis for a determination that the University is acting "arbitrarily and capriciously" when it relies on the results.

The theme of the Verified Petition is that the University has railroaded Petitioner in its zeal to find that he committed research misconduct. This could not be farther from the truth. The University has nothing to gain by a finding that one of its faculty fabricated, falsified, and plagiarized research funded by NSF. The University stands to lose the implicated NSF grant(s), may face increased scrutiny from NSF moving forward, and shares in the embarrassment of this entire episode. *Dewhurst Aff*. ¶103-07. Despite all that, the University's allegiance is to scientific truth and, unfortunately, the truth is that Petitioner committed misconduct in his research.

POINT IV
THE UNIVERSITY'S POLICY SCHEMATIC DOES NOT REQUIRE THE GRIEVANCE COMMITTEE TO REVIEW THE INVESTIGATION COMMITTEE'S PROCESS AND FINDINGS

The Verified Petition seeks a second bite at the apple. It contends that "because the investigation relates to [Petitioner's] academic freedom, a Grievance Committee must assess

evidence and develop a factual record" *Pet*. ¶142. Petitioner is referring to the General Grievance Policy, but it does not apply in the way that he contends. Petitioner also alleges that "because the investigation jeopardizes [Petitioner's] tenure track, the UCTP must evaluate that factual record before any decision is made concerning Dr. Dias's employment." *Id*. This is a request for yet a third bite at the apple. This simply not the way the University's policies fit together.

The University policy that applies to allegations of research misconduct is the Research Misconduct Policy. *Dewhurst Aff.* Ex. B. It is a self-contained policy. It sets forth the steps for the handling of an allegation, through investigation, and then to a final determination on the allegations as to research misconduct. *Id.* Once the final determination on the merits of the allegations has been reached, if there is a recommendation that the faculty member's contract be terminated, the University's policies on faculty termination come into play. *Id.* ("Adjudication and Further Action"). The UCTP Committee appoints a faculty committee to provide its input on the termination recommendation. [NYSCEF Doc. No. 7, p. 51]. Importantly, the faculty handbook expressly states that the faculty committee is to accept the findings a research misconduct policy as "determinative" of the policy violation. *See id.*

Very simply, Petitioner is not entitled to what he seeks: one or two additional faculty committees essentially starting from scratch, developing a "factual record" concerning all of his gripes and grievances over the Investigation into the allegations of research misconduct. This is not the role of the UCTP and it is not the role of the General Grievance Policy. It would be an end-run around the Research Misconduct Policy and would result in multiple committees pressed into service to review and re-review the research misconduct allegations. The University's policies are not a merry-go-round of investigations and investigations into investigations.

The Research Misconduct Policy is the applicable policy. The University substantially complied with the Research Misconduct Policy which resulted in an Investigation Committee finding Petitioner responsible for a serious series of scientific fabrication, falsification, and plagiarism. It is an unfortunate circumstance for everyone involved, including the University. But it is the truth, and scientific truth is the University's primary responsibility even if the University's own reputation is tarnished alongside Petitioner's. *Dewhurst Aff*. ¶¶104-107.

POINT V
THERE IS NO BASIS FOR THE REQUESTED RELIEF

The Verified Petition asks the Court for the following relief: an Order "compelling respondent to show cause why it should not be enjoined from taking any adverse action against [Petitioner] until a grievance committee establishes an unbiased factual record, and an unbiased investigation committee is convened to evaluate the allegations of research misconduct". There is no basis for the requested relief.

For the reasons explained above, the requested Order is Petitioner seeking to devise his own, more preferred policy configuration. An Article 78 proceeding is not a blue-pencil tool. If the University substantially complied with applicable policy (and it did) and if the University's actions were not arbitrary or capricious (and they were not), there is no basis for any Article 78 relief.

Here, the particular requested relief is even farther outside the permissible zone of an Article 78 proceeding. In accordance with the Research Misconduct Policy, the Provost has accepted the final Investigation report and findings and stated his judgment that Petitioner's faculty status should be terminated. The Provost's recommendation will go to the UCTP to appoint a faculty committee for their recommendation, and, eventually, these recommendations will be considered by the President. If the President decides termination is appropriate, the matter will

proceed to the Board of Trustees, which body is authorized to terminate a faculty member within the term of a current contract, as is Petitioner. *Figlio Aff*., ¶¶15-18.

Courts rarely intercede in a university's employment decisions concerning faculty members in any set of circumstances. It has long been recognized that the selection of faculty is "one of the most critical campus choices". *New York Inst. of Tech. v. State Div. of Human Rights*, 40 N.Y.2d 316, 322 (1976). "The management of the university is primarily the responsibility of those equipped with the special skills and sensitivities necessary for so delicate a task." *See Pauk v. Bd. of Higher Educ.*, 62 A.D.2d 660, 665 (1st Dept. 1978) (citations omitted), *aff'd* 48 N.Y.2d 930, 931 (1979); *see also Maas*, 94 N.Y.2d at 92. Accordingly, it is well settled in New York that "courts should not 'invade, and only rarely assume academic oversight, except with the greatest caution and restraint, in such sensitive areas as faculty appointment, promotion, and tenure, especially in institutions of higher learning.'" *See Loebl*, 255 A.D.2d at 257 (citing *Matter of Pace Coll. v. Commission on Human Rights*, 38 N.Y.2d 28, 38 (1975)); *see also Gertler v. Goodgold*, 107 A.D.2d 481, 486 (1st Dept. 1985), *aff'd* 66 N.Y.2d 946, 948 (1985).

Petitioner's requested relief is the "invasion" warned against. The issue in this case is quintessentially an academic matter: scientific research misconduct. Petitioner asks the Court not to review a completed termination decision but to enjoin the University from making the termination decision until, apparently, the University's processes are done and redone to the satisfaction of the Petitioner or the Court or some combination thereof. The record provides no basis for this extraordinary level of judicial intervention in a university's academic affairs.

CONCLUSION

For the reasons stated here and in the Verified Answer and accompanying Affirmations, the Verified Petition should be denied in its entirety.

Dated: March 28, 2024

BOND, SCHOENECK & KING, PLLC

By: _____

Laura H. Harshbarger
Liza R. Magley
One Lincoln Center
Syracuse, New York 13202-1355
Telephone: (315) 218-8000
Email: lharshbarger@bsk.com
lmagley@bsk.com

Attorneys for Respondent
University of Rochester

22 N.Y.C.R.R. 202.8-B CERTIFICATION

I, Laura H. Harshbarger, hereby certify that the foregoing memorandum of law was prepared on a computer using "Times New Roman" typeface, in 12-point size, with double-line spacing, and that the total number of words in the memorandum of law, exclusive of its caption, table of contents, table authorities, signature block, and 22 N.Y.C.R.R. 202.8-b Certification, as calculated by the word processing system used to prepare this brief, is 6,960.

Dated: March 28, 2024

Laura H. Harshbarger